

Implications for Asian business: UK Criminal Finances Act 2017



The Guidance makes it clear that higher risk business lines will be those involved in giving bespoke financial advice or tax advice. Those risks are made higher for organisations connected to “offshore jurisdictions”, “tax havens” or “secrecy havens”.

ON THE 27TH APRIL 2017, The Criminal Finances Act 2017 received Royal Assent at the UK Parliament. The Act became effective law from 30th September 2017. The Act has impact on businesses based in the UK and those located overseas.

On the 1st September 2017, [UK Government guidance](#) was issued by HMRC which came into effect on the 30th September 2017.

It is imperative therefore that your business considers carefully the impact of this new legislation on existing business policies and procedures and implement appropriate changes to systems, controls and update your staff training to make sure your company meets the statutory defence which is referred to below.

This Act introduces new corporate offences:

1. Failure of a relevant corporate body to prevent the facilitation of UK tax evasion by an associated person; (the UK tax evasion offence)
2. Failure of a relevant corporate body to prevent the facilitation of non-UK tax evasion by an associated person (the foreign tax evasion offence)

Relevant Body

Relevant body means a body corporate or partnership (wherever incorporated or formed).

Partnership means:

- a partnership within the meaning of the Partnership Act 1890, or
- a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar

character formed under the law of a foreign country.

Associated Person

An associated person for the purposes of the offence is:

- An employee of the corporate body or partnership, when acting in the capacity of employee;
- An agent of the corporate body or partnership, when acting in the capacity of agent;
- Any other person performing services for or on behalf of the corporate body or partnership, when acting in the capacity of provider of the relevant services

The new corporate offences

The UK tax evasion offence is split into three stages:

1. Criminal evasion of UK tax by the taxpayer
2. Criminal facilitation of the tax evasion by an “associated person” of the relevant body who is acting in that capacity

3. Failure by the relevant body to prevent that facilitation.

It is vital that businesses understand that this is a strict liability offence for an entity for the actions of associated persons regardless of knowledge or intention. However, there is some better news in that there is a statutory defence.

Penalties

Significant Brand and reputational damage and an Unlimited fine and a ban on bidding for public contracts. Potential other sanctions upon conviction including confiscation.

The Statutory defence

It is a statutory defence where at the time of the offence the relevant body had reasonable prevention procedures in place to prevent its associated persons from committing tax evasion facilitation offences or where it is unreasonable to expect such procedures.

REASONABLE PREVENTION PROCEDURES

These procedures follow the same principles based guidance as for the UK Bribery Act. As such many organisations will already have procedures in place to prevent bribery. It will not however be sufficient just to rely on those procedures. An organisation will need to do a full risk analysis, and put in place procedures specific to their organisations operational risk profile.

Principle 1 – Risk assessment

Principle 2 – Proportionality of risk-based prevention procedures

Principle 3 – Top level commitment

Principle 4 – Due diligence

Principle 5 – Communication (including training)

Principle 6 – Monitoring and review

[Link to Article](#)

Extra-territorial Application

It is crucial that businesses understand that these new offences could be committed outside of the UK, and those businesses involved in wealth and asset management should assess their overseas operations risk profiles and take proactive steps to manage those risks.

For the new overseas tax offences to have been committed, in addition to establishing the same stages as for the UK tax evasion offence referred to above, then the UK prosecutors would need to also demonstrate both a nexus with the UK and dual criminality.

The UK Nexus test

This test will be satisfied where the relevant body has either:

1. Has been incorporated or formed under UK law; or
2. Carries on business in the UK; or
3. Where any of the conduct constituting the facilitation of the foreign tax evasion takes place in the UK

If you look at the government guidance we refer to above you will note that examples of situations where UK nexus is satisfied include:

1. Any UK bank with overseas branches
2. Any overseas bank with a London branch.
3. Any bank which does not conduct any business in the UK but where its associated person (acting in that capacity) facilitates the criminal act from the UK

Dual criminality test

The “dual criminality” test will be met where both the actions of the taxpayer (tax evasion) and of the facilitator would be an offence in the UK and where the overseas jurisdiction also has equivalent criminal offences at both the taxpayer and facilitator level; the offence cannot be committed in relation to an act that would not be illegal in the UK.

ACTION POINTS

- Following the Principles set out above Senior Management should carry out a fresh proportional risk based review of all existing Anti-money laundering, anti-bribery and other financial crime policies procedures and training. Where the risks are identified as being too high an organisation may decide to consider de-risking.
- Enhanced due diligence requirements may be needed where the client has a higher risk profile e.g. connected to a tax haven
- Create reasonable preventative procedures with an emphasis on the issue of tax evasion and communicate those procedures remembering to include whistleblowing mechanisms, making sure to refresh and document all training of staff to reflect these new procedures. Such training needs to cover off the potential liability of those the organisation may fall liable for under the associated person definition.
- Carry out appropriate regular documented monitoring and review of how these new reasonable preventative procedures are working within your organisation and make sure these procedures are being complied with on an ongoing basis.



OTHER PROVISIONS OF THE UK CRIMINAL FINANCES ACT WHICH ARE DUE TO COME INTO FORCE LATER THIS YEAR:

Unexplained Wealth Orders

The Act creates a process by which UK law enforcement authorities can seek an Unexplained Wealth Order (“UWO”) against an individual or company suspected of being involved in or associated with serious financial crimes.

- The individual is a “politically exposed person”; or
- There are reasonable grounds for suspecting that the individual is or has been involved in serious crime, or a person connected with the individual is.

It is clear therefore that this legislation will have a particularly strong impact on those engaged in wealth and asset management globally.

The UK Authorities can apply to the High Court without notice to the subject of the Order including a request for an interim freezing order, for an UWO and can require individuals to explain (within a time period set by the Court) the origin of assets which appear to be disproportionate to their income, or risk the assets being seized.

The UWO provisions have not yet come into force.

To obtain a UWO from the High Court the Enforcement Authority will need to demonstrate:

- There is reasonable cause to believe that the individual holds the property in question, and the value of that property is greater than £50,000; and

Consequences

The onus of proof is on the defendant. If a person subject to a UWO fails to comply with the order without reasonable excuse, their interest in the property will be presumed to be recoverable through existing civil recovery powers for the purpose of any proceedings taken in respect of the property (e.g. a freezing order).

Neither the property or the respondent needs to be within the UK. In addition, a person found guilty of making a false statement in response to a UWO will be liable to a term of imprisonment not exceeding two years, a fine or both.

For further details on UWO see: [UK Home Office Fact sheet](#) ■

